IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
(Before Hood, P.J., Holbrook Jr., J.J., and Owens, J.J.)

TAXPAYERS OF MICHIGAN AGAINST CASINOS, and LAURA BAIRD,

Plaintiff-Appellants,

v.

the STATE OF MICHIGAN,

Defendant-Appellee,

And

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, and GAMING ENTERTAINMENT, LLC,

Intervening Defendants-Appellees.

Supreme Court No. 122830

Court of Appeals No. 225017

Ingham County Cir. Ct. No. 99-90195-CZ

BRIEF ON APPEAL – *AMICI CURIAE* LITTLE RIVER BAND OF OTTAWA INDIANS, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, NOTTAWASEPPI HURON BAND OF POTAWATOMI, AND POKAGON BAND OF POTAWATOMI INDIANS

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INTERESTS OF THE AMICI TRIBES

In 1988, Congress enacted the Indian Gaming Regulatory Act, 25 USC §§ 2701-2721 ("IGRA"), "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." *See* 25 USC § 2702(1). In the years that have followed, Michigan's Indian tribes have sought to realize the promise of IGRA by developing gaming operations and utilizing the proceeds from those operations to better the lives of their members and to strengthen the fabric of their governmental institutions. The State of Michigan has demonstrated its assent in these efforts by consummating a series of gaming Compacts with the tribes. In 1993, the State entered into seven such Compacts, and in 1998 it agreed to Compacts with four additional tribes. It is these latter Compacts, signed by the State and *Amici* here – the Little River Band of Ottawa Indians (the "Little River Band"), the Little Traverse Bay Bands of Odawa Indians (the "Little Traverse Bands"), the Pokagon Band of Potawatomi Indians (the "Pokagon Band"), and the Nottawaseppi Huron Band of Potawatomi (the "Huron Band") (collectively the "Amici Tribes") – that Appellants seek to invalidate.

The Amici Tribes have a critical interest in the outcome of this action. Experience in Michigan has proven that gaming can indeed operate, as Congress in 1988 hoped it would, to foster tribal economic and political development. At the time that the Michigan tribes commenced gaming, they had endured a century and a half of economic and cultural deprivation. Living conditions for tribal members residing on reservations were very poor, and the tribes lacked many elements of a proper governmental infrastructure. *See, e.g, Grand Traverse Band of Ottawa & Chippewa Indians v United States Attorney*,

198 FSupp2d 920, 926 (WD Mich 2002) (as of 1993, the Grand Traverse Band had "significant unmet economic and noneconomic needs"), appeal docketed, No. 02-1679 (CA 6, 2003). In 1989, for example, the unemployment rate among Michigan Indians living on and adjacent to Reservations averaged 37.4 percent, or more than four times the statewide rate.[1] The per capita income among Michigan's Indian population in 1989 was $6,807, compared with a per capita income statewide of $14,154.[2]

This disparity in economic conditions mirrored a disparity in health and educational circumstances. Indians in the region faced diabetes and alcoholism mortality rates five times the national average,[3] and a tuberculosis mortality rate thirteen times the national rate.[4] Only 4.5 percent of reservation Indians had a college degree or higher, while in Michigan overall, the figure was 17.4 percent.[5]

Gaming has led to dramatic improvements in these conditions. It has served as an engine of economic development and employment for tribes. The gaming casino operated by amicus Little River Band, for instance, employs over 900 full-time

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[1] US Department of the Interior, Bureau of Indian Affairs, *Indian Service Population and Labor Force Estimates*, Table 3 (Dec. 1991).

[2] US Department of Commerce, Bureau of the Census, *Income and Poverty Status in 1989*, 1990 Summary Tape File 3 (DP-4) (Michigan); US Department of Commerce, Bureau of the Census, *Per Capita Income in 1989 by Race*, 1990 Summary Tape File 3, P115A (Michigan).

[3] US Department of Health and Human Services, Indian Health Service, *Regional Differences in Indian Health* (1990), Table 4.18. This analysis includes the Tribes in Michigan, together with those in Wisconsin and Minnesota.

[4] *Id.* at Table 4.21.

[5] *Id.* at Tables 4.16, 4.17; 1990 Census, American Indian at Table 7; 1990 Census, Social Characteristics, Summary Tape File 3, DP-2 (Michigan).

individuals, of whom close to 100 are tribal members. The Tribe's gaming revenues also provide significant support for its governmental services, including in the order of $4 million for housing, health, elder, and social services; nearly $2 million for public safety and the tribal judiciary; and nearly $1 million for education. *See* Attachment A. These governmental operations, in turn, provide over 100 additional jobs for tribal members (and nearly 200 for others). Amicus Little Traverse Bands has likewise thrived from its gaming operations. Its casino employs over 500 people, of whom over 100 are tribal members. The casino provides over $3 million for that Tribe's housing, health, and human services; over $700,000 for its law enforcement and judiciary; and over $700,000 for education services. *See* Attachment B. As in the case of the Little River Band, these governmental services, in turn, provide jobs for 100 tribal members. *See also Grand Traverse Band*, 198 FSupp2d at 926 ("The [Grand Traverse Band] casino now employs approximately 500 persons, approximately half of whom are tribal members . . . [It] provides some of the best employment opportunities in the region.").[6]

The great strides in tribal self-governance facilitated by gaming have also led to a degree of cooperation between tribal, state, and local governments that was largely

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[6] As the figures in the text indicate, Indian gaming provides significant benefits not only to tribal members but also to many non-Indians who work at, or do business with, tribal gaming establishments. Earlier this month, for instance, the Little Traverse Bands received the *Mission Award* from the Petoskey Regional Chamber of Commerce for exemplifying the Chamber's goals of sound government and well-ordered economic growth. *See generally* Bentley, "Petoskey Names Business Champions," *Petoskey News*, Dec 12, 2003; State of Michigan, *Legislative Tribute*, 92nd Legislature, Dec 3, 2003 (Attachment C). The award recognizes the Tribe as "an integral economic force in the region" and commends its support for many Chamber programs, which have renewed public interest and understanding of the Tribe's cultural heritage and local history. *See* Petoskey Regional Chamber of Commerce, *Chamber Mission Award, Certificate of Recognition*, Dec 2, 2003 (Attachment D).

unheard of when the tribes lacked the governmental resources to devote to such efforts. Cooperation between the state and tribal courts, for instance, has led to the adoption of companion rules for observing the full faith and credit of each other's "judgments, decrees, orders, warrants, subpoenas, records, and other judicial acts." *See* MCR 2.615; Little River Band Reg 1.100-1.103; Little Traverse Bay Bands CR 4.000-4.400; Grand Traverse Band CR 10.001-10.107; Bay Mills Indian Community CR 1.101-1.301; Hannahville Indian Community, CR 1.000-1.300). *See generally* Cavanagh, *Michigan's Story: State and Tribal Courts Try to Do the Right Thing*, 76 U Det Mercy L Rev 709 (1999).

Michigan's gaming tribes have also entered into cooperative law enforcement agreements with local officials that have strengthened the ability of the respective jurisdictions to combat crime. The *Interlocal Agreement for Deputization and Mutual Law Enforcement Assistance Between the Little Traverse Bay Bands of Odawa Indians and the County of Emmet* (Attachment E) is one example. That agreement allows state or county officers to execute search warrants within the Bands' reservation by first converting the warrant into a tribal court warrant and then executing it with tribal police, non-tribal police officers, or a combination of both. *See id.* at 3-5. A similar agreement exists between the Grand Traverse Band of Ottawa and Chippewa Indians and Leelanau County. *See Deputization Agreement Between the Grand Traverse Band of Ottawa and Chippewa Indians and the Sheriff of Leelanau County* (Attachment F) at 4 ("County law enforcement officers shall present search warrants authorizing the search for evidence located on the Tribe's reservation and Indian country . . . to Tribal law enforcement

authorities for execution."). Such vitality in the relations between tribal and state governments was largely non-existent prior to the onset of IGRA gaming, given the tribes' meager resources.

In sum, Michigan tribal members have experienced a significant improvement in their economic, health, educational and social conditions as the result of Indian gaming. Michigan tribal governments have also experienced a renaissance due to the critical funding that gaming provides for their operations. But much more remains to be done. Two of the Amici Tribes have only had a few short years to begin to remedy the socio-economic problems that have plagued their people for many decades and to restore their tribal governments to a full measure of dignity. The other two Amici Tribes have not yet had any opportunity to even begin to make such progress.[7] In this respect, the Amici Tribes' interest in this case is thus both obvious and critical. They seek to ensure that the promise of IGRA and the compacts – the promise of an opportunity for a brighter economic future and stronger tribal governments – does not go unrealized.

The Amici Tribes also have a vital interest in correcting the fundamental misapprehension of the law that pervades TOMAC's submission to this Court. In styling the Compacts as involving the relinquishment of State regulatory authority over Indian gaming, and hence as requiring legislation, TOMAC's brief turns long-accepted

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[7] The profound impact of gaming on the economic circumstances of tribal members is well illustrated by the differences between the Amici Tribes. In 1999, the median household income for the two tribes that have not yet undertaken gaming, the Huron Band and the Pokagon Band, was $14,375 and $29,750, respectively. For the same year, the median household income of the Little River Band and Little Traverse Bay Bands, each of which had commenced IGRA gaming, was $40,156 and $40,385, respectively. US Census Bureau, *Census 2000*, Profile of Selected Economic Circumstances, DP-3.

principles regarding the lack of state jurisdiction in Indian country on their head. The Compacts instead denote the State's assent to the gaming tribes' exercise of their rights under federal law. Properly viewed as such, they do not embody state legislation. It is to this point, and with the hope of complementing the submissions by the State of Michigan, the Intervenors, and the other supporting *amici curiae* that this brief now turns.[8]

STATEMENT OF JURISDICTION

The Amici Tribes agree with, and incorporate by reference herein, the Statement of Jurisdiction set forth in the *Brief on Appeal – State of Michigan as Appellee.*

QUESTIONS PRESENTED

The Amici Tribes agree with, and incorporate by reference herein, the Statement of Questions Presented as set forth in the *Brief on Appeal – State of Michigan as Appellee* as well as the State's answers to those questions.

COUNTER-STATEMENT OF FACTS

The Amici Tribes agree with, and incorporate by reference herein, the Counter-Statement of Facts set forth in the *Brief on Appeal – State of Michigan as Appellee.*

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[8] Tribal interest in this case extends beyond the four Amici Tribes. The Court of Appeals noted that if the 1998 compacts are invalid on the basis asserted by appellants here, the 1993 compacts might be as well. *See Taxpayers of Michigan Against Casinos v State of Michigan*, 254 Mich App 23, 47 n8, 657 N.W.2d 503 (2002). Federal district court Judge David W. McKeague has made a similar observation. *See Baird v Babbitt*, No 5:99-CV-14, slip op at 7-8 n1 (WD Mich May 21, 1999), *aff'd, Baird v Norton*, 266 F3d 408 (CA 6, 2001). Judge McKeague's opinion appears in the Appellant's Appendix ("TOMAC App.") at 78a-104a. Several of the tribes that were parties to the 1993 compacts are also submitting an *amicus* brief in support of the State's position.

SUMMARY OF ARGUMENT

TOMAC's characterization of the 1998 Compacts as involving lawmaking rests on a fundamentally incorrect premise. The State had no lawmaking authority over Indian gaming before the Compacts, and it has no lawmaking authority over Indian gaming today. Consistent with the federal Constitution's allocation of plenary Congressional authority over Indian affairs, federal law – to the exclusion of state law – controls the activities of tribes on Indian lands. Applying this principle, the United States Supreme Court held, in *California v Cabazon Band of Mission Indians*, 480 US 202 (1987), that states (like Michigan) that do not prohibit casino gaming for all persons and purposes cannot regulate gaming by Indian tribes. When Congress enacted IGRA in 1988, it preserved the rule of *Cabazon*, and provided that states (unless they prohibit gaming for everyone) have no authority over Indian gaming, except to the extent a tribe may *agree* to state authority in a compact. In Michigan, the State did not seek authority over Indian gaming in the Compacts, and the Amici Tribes did not authorize any such state authority. To the contrary, the State clearly and expressly *disclaimed* any regulatory or adjudicatory authority over Indian gaming. These disclaimers of authority by the State, concerning a matter as to which the State had no authority in the first place, did not constitute state lawmaking.

To the contrary, established principles (and practice) render it clear that state action consenting to the application of federal law does not involve lawmaking. For example, it is well-settled that states ratify federal constitutional amendments by resolution, not by bill. This Court has recognized the propriety under Michigan law of

the legislature approving federal constitutional amendments by resolution, and has held that such expressions of consent to federal law are not state lawmaking. *See Decher v Vaughan*, 209 Mich 565, 571 177 NW 388, 391 (1920). This principle – that state consent to the application of federal law is not state lawmaking – is also reflected in connection with state disclaimers of authority over Indian country. *See Omaha Tribe of Nebraska v City of Walthill*, 334 F Supp 823, 827 & n6 (D Neb 1971), *aff'd*, 460 F2d 1327 (CA 8, 1972). Since the State in the Compacts merely consented to the continued application of federal (and tribal) law in connection with Indian gaming, the requirements of formal lawmaking were not called into play.

ARGUMENT

I. Introduction.

TOMAC's submission to this Court hinges on the premise that, under IGRA, the States gained an automatic measure of regulatory control over gaming in Indian country: "When Congress enacted IGRA, it recognized the preeminent regulatory and policy-making role of states." TOMAC Brief at 9.[9] Based on this premise, TOMAC argues that, through the Compacts, "a minority of legislators . . . *effectively repealed the application of [State] laws to Indian lands* and left the State without jurisdiction over

[9] *See also id.* at 8 ("Congress enacted IGRA to give states a role in regulating Indian gambling."), 10 (IGRA "enables a state to apply its policy decisions to Indian gambling conducted within the state's borders."), 26 ("Congress granted an important policy-making role to States" with respect to tribal gambling.), 50 ("IGRA . . . reinforces the role of the State by expressly applying to Indian country the normal laws of the State governing casino-style gambling, unless and until the State makes different policy choices in a valid gambling compact.").

tribal gaming operations." *Id.* at 25 (emphasis added). Legislative repeals of this sort, TOMAC concludes, are impermissible absent formal legislation.

TOMAC's starting premise is entirely incorrect. Under long-accepted principles of Indian law, the States do not enjoy regulatory control or jurisdiction over tribal activities taking place on tribal land. The United States Supreme Court's seminal decision in *California v Cabazon Band of Mission Indians*, 480 US 202, confirmed that this rule applies in the context of Indian gaming, and IGRA wrote that rule into the statute books.

II. Federal, Not State, Law Governs Tribal Activities on Indian Lands.

Chief Justice William Rehnquist, writing for a unanimous Supreme Court in *Oklahoma Tax Commission v Potawatomi Indian Tribe*, 498 US 505 (1991), summarized almost two centuries of federal Indian law with a simple statement: "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members *and territories*." *Id.* at 509 (emphasis added). Since the early days of the Republic, the Court consistently has declared that Indian tribes possess attributes of sovereignty, subject only to the limits that Congress, rather than the States, may impose.

> The powers of Indian tribes are, in general, "*inherent powers of a limited sovereign which has never been extinguished.*" F. Cohen, Handbook of Federal Indian Law 122 (1945) (emphasis in original). Before the coming of the Europeans, the tribes were self-governing sovereign political communities. . . . The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. *But until Congress acts, the tribes retain their existing sovereign powers.*

United States v Wheeler, 435 US 313, 322-323 (1978) (emphasis added). Accordingly, the Indian tribes have "thus far not [been] brought under the laws . . . of the State within

whose limits they resided." *White Mountain Apache Tribe v Bracker*, 448 US 136, 142 (1980) (citations and quotations omitted); *see also Cherokee Nation v Georgia*, 30 US 1, 16 (1831) (an Indian tribe is a "distinct political society... capable of managing its own affairs and governing itself"); *Worcester v Georgia*, 31 US 515, 556-57 (1832) (Indian tribes retain "their right of self-government").

Congress's exclusive authority over Indian tribes is grounded in the Constitution, principally in its Indian Commerce Clause, US Const Art I, § 8, cl 3 ("Congress shall have the Power . . . To regulate Commerce with foreign nations, and among the several States, *and with the Indian Tribes.*") (emphasis added). *See County of Oneida v Oneida Indian Nation*, 470 US 226, 234 (1985); *McClanahan v Arizona State Tax Commission*, 411 US 164, 172 n7 (1973) (citing US Const Art I, § 8 cl 3 and Art II, § 2, cl 2.). At the Constitutional Convention, the States agreed to centralize Indian affairs in the National Government, having found the prior approach set forth in Articles of Confederation wholly unsatisfactory.[10]

From its earliest decisions concerning relations with Indians, the Supreme Court has broadly construed the Indian Commerce Clause, and other constitutional provisions

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[10] Article IX(4) of the Articles of Confederation contained ambiguous language that left unresolved tensions about whether ultimate authority over Indian affairs would remain with Congress or with individual states. *See generally*, Francis P. Prucha, *American Indian Policy in the Formative Years*, 38 (1962). James Madison "cited the National Government's inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation, and urged adoption of the Indian Commerce Clause, Art I, § 8, cl 3, that granted Congress the power to regulate trade with the Indians." *County of Oneida v Oneida Indian Nation*, 470 US at 235 n4. With the ratification of the Constitution, the States agreed to federal control of Indian affairs, including Indian tribes within the Commerce Clause. *See generally*, Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn L Rev 1055, 1140-1147 (1995); Prucha, *supra* at 41.

touching upon Indian affairs, to afford the federal government exclusive, or "plenary," control over all aspects of Indian affairs. As described by Chief Justice John Marshall:

> That instrument [the Constitution] confers on Congress the powers of war and peace: of making treaties and of regulating commerce with foreign nations, and among the several States, and with the Indian Tribes. *These powers comprehend all that is required for the regulation of our intercourse with the Indians.* They are not limited by any restriction on their free actions. The shackles imposed on this power, in the confederation, are discarded.

Worcester v Georgia, 31 US at 559 (emphasis added). The Court has reiterated this principle time and time again. *See, e.g., County of Oneida*, 470 US at 234 ("[w]ith the adoption of the Constitution, Indian relations became *the exclusive province of federal law*"); *Montana v Blackfeet Tribe of Indians*, 471 US 759, 764 (1985) ("[t]he Constitution vests the Federal Government with exclusive authority over relations with Indian tribes.").

As a necessary corollary, the Court has held that the States are generally precluded from exercising governmental authority over tribes and their reservations. *See Seminole Tribe of Florida v Florida*, 517 US 44, 62 (1996) (under the Indian Commerce Clause, "the States . . . have been divested of virtually all authority over Indian commerce and Indian tribes."). *See also Rice v Olson*, 324 US 786, 789 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history"). Thus, "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." *McClanahan v Arizona State Tax Commission*, 411 US at 170-171 (internal quotation marks omitted). *See also Kobogum v Jackson Iron Co*, 76 Mich 498, 508, 43 NW 602, 605 (1889) ("They

[the tribes] were placed by the Constitution of the United States beyond our jurisdiction, and we had no more right to control their domestic usages than those of Turkey or India."); *Three Affiliated Tribes of the Fort Berthold Reservation v Wold Engineering*, 476 US 877, 891 (1986) ("in the absence of federal authorization, . . . all aspects of tribal sovereignty [are] privileged from diminution by the States."); *Washington v Confederated Tribes of the Colville Reservation*, 447 US 134, 154 (1980) ("tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States."). As demonstrated below, TOMAC's claims that IGRA alters this general presumption and embodies a Congressional declaration that state gaming laws apply of their own force to Indian tribes is nothing more than wishful thinking.

III. The General Principle that States Lack Regulatory Authority Over Tribal Activities Applies Squarely to Indian Gaming.

In *California v Cabazon Band of Mission Indians*, 480 US 202, the Supreme Court made it clear that the above principles apply with full force to Indian gaming. The Court held that, "in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government," Indian tribes have the sovereign right to engage in gaming on their reservations, free from any state authority, so long as the state where the gaming activity is located does not prohibit all such gaming (including for charitable purposes or otherwise) as a matter of criminal law and public policy. *See id.* at 211, 216-222.

Cabazon, the Supreme Court has explained, is a decision grounded in the Indian Commerce Clause; it establishes that on-reservation Indian gaming involves the action of tribes *qua* sovereigns, and is therefore subject to the exclusive authority of Congress. *See*

Seminole Tribe, 517 US at 58, 72. Under *Cabazon,* in states (like Michigan), which do not prohibit gaming for all intents and persons, the tribes and the federal government retain the exclusive right to regulate gaming on Indian lands.

A year after the decision in *Cabazon*, Congress enacted IGRA. Through that statute, Congress plainly reaffirmed the *Cabazon* principle and "expressly pre-empt[ed] the field of governance of gaming activities on Indian lands." S Rep No 100-446 at 6, 100th Cong, 2nd Sess, *reprinted in* 1988 USCCAN 3071, 3076. *See Gaming Corp of America v Dorsey & Whitney*, 88 F3d 536, 544 (CA 8, 1996) (IGRA "completely preempt[s] state law"). In its opening section, IGRA states, in language tracking *Cabazon*, that:

> Indian tribes have the *exclusive right to regulate gaming activity on Indian lands* if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 USC § 2701(5) (emphasis added). The Act then sets forth a comprehensive *federal* regulatory scheme, including the establishment of the National Indian Gaming Commission, under which tribes may engage in three classes of gaming activity on Indian lands. *See generally Dorsey & Whitney*, 88 F3d at 544-46 (explaining IGRA structure).

With respect to "Class III" (or casino-style) gaming, Congress codified the *Cabazon* rule, confirming that tribes may engage in such gaming on tribal lands if "located in a State that permits such gaming *for any purpose by any person, organization, or entity*." *Id.* § 2710(d)(1)(B) (emphasis added). Where that condition is met, IGRA gives states an opportunity to "negotiate . . . in good faith" with tribes over the terms by

which tribes intend to exercise their federal right to engage in casino-style gaming. *See* 25 USC § 2710(d)(3)(A), §2710(d)(7).[11] It is absolutely incorrect to assert, however, that in providing states with this bargaining opportunity, IGRA renders state laws applicable *a fortiorari* to Indian gaming.

Cabazon remains the legal backdrop for all aspects of the compacting process. Accordingly, while tribes remain free to agree to a different arrangement by compact, the baseline rule is that they retain the exclusive authority to regulate Indian gaming. Indeed, the only way a state like Michigan could obtain any regulatory or adjudicatory authority over Indian gaming would be if a tribe affirmatively agreed to permit such state authority in a compact. This limitation on state authority was underscored by the Senate Committee Report on the bill that became IGRA:

> [I]n the exercise of its sovereign rights, *unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities.*
>
> The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is the tribal-state compact. *In no instance does S. 555 [enacted as IGRA] contemplate the extension of State jurisdiction or the application of State laws for any other purpose.*

S Rep No. 100-446, pp 5-6, *reprinted in* 1988 USCCAN 3071, 3075-76 (emphasis added).

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[11] The precondition for Class III gaming, turning on whether a state "permits such gaming for any purpose by any person, organization, or entity" is a question of federal law. *See, e.g., Dorsey & Whitney*, 88 F3d at 548; *State v Johnson*, 904 P2d 11, 20 (NM 1995). As the State of Michigan explains in its brief, it is clear that Michigan permits casino-style gaming. *See* MCL 432.201-432.216.

Consistent with this clear statement, the courts have uniformly concluded that state laws and regulations do not apply to Indian gaming – unless otherwise provided in a compact. *See, e.g., Cabazon Band of Mission Indians v Wilson*, 124 F3d 1050, 1059-60 (CA 9, 1997) (IGRA preserves the "long-established principle that the jurisdiction of the state and the application of state law do not extend to Indian lands *absent the consent of the tribes*.") (emphasis added); *Dorsey & Whitney*, 88 F3d at 545 ("Congress did not intend to transfer any jurisdictional or regulatory power to the states by means of IGRA *unless a tribe consented* to such a transfer in a tribal-state compact.") (emphasis added); *State of Rhode Island v Narragansett Indian Tribe*, 19 F3d 685, 690 (CA 1, 1994) (IGRA "*forbids* the assertion of state civil or criminal jurisdiction over class III gaming except when the tribe and the state have negotiated a compact that permits state intervention.") (emphasis added); *Lac du Flambeau Band of Lake Superior Chippewa Indians v Wisconsin,* 743 F Supp 645, 652 (WD Wis 1990) ("the passage of [IGRA] has preempted [the State] from exercising criminal jurisdiction over gambling activities on the reservations in the absence of a tribal-state compact that confers such authority on the state by agreement."). This makes sense because, if state law did apply to Indian gaming of its own force, "[t]he compact process that Congress established as the centerpiece of the IGRA's regulation of class III gaming would thus become a dead letter; there would be nothing to negotiate." *Mashantucket Pequot Tribe v State of Connecticut*, 913 F2d 1024, 1031 (CA 2, 1990).[12]

[12] In claiming, contrary to this overwhelming authority, that Congress granted states regulatory and policy making authority under IGRA, TOMAC cites to 25 USC § 2710(d)(3)(C). *See*

TOMAC's claim that Congress has further rendered the State's regulatory apparatus automatically applicable to Indian tribes by virtue of 18 USC § 1166 is likewise misguided. *See* TOMAC Brief at 9. Section 1166 provides that tribal gaming in the absence of a compact is a *federal* crime, and provides the *federal government* with exclusive jurisdiction to prosecute such crimes. Section 1166 merely incorporates state law standards by reference for utilization by the federal government if it elects to pursue such prosecutions. The courts have therefore uniformly rejected TOMAC's argument that this provision of federal law provides the States with authority over Indian gaming. *See, e.g., Sycuan Band of Mission Indians v Roache*, 54 F3d 535, 538 (CA 9, 1994) ("the State had no authority to prosecute the Bands' employees for conducting the Bands' gaming"); *United Keetoowah Band of Cherokee Indians v State of Oklahoma ex rel Moss*, 927 F2d 1170, 1177 (CA 10, 1991) ("the power to enforce these newly incorporated laws rests solely with the United States"); *Lac du Flambeau Band of Lake Superior Chippewa Indians v Wisconsin,* 743 F Supp at 653.

TOMAC Brief at 23, 35. That subsection of IGRA lists subjects, such as "the application of the criminal and civil laws and regulations of the Indian tribe or the State" and "the allocation of criminal and civil jurisdiction between the State and the Indian tribe," which "*may*" be addressed in a tribal-state compact, *see* 25 USC § 2710(d)(3)(C) (emphasis added). Such a provision obviously does not render State law applicable to tribal gaming absent tribal consent.

TOMAC plucks a phrase from the Sixth Circuit's decision in *Keweenaw Bay Indian Community v United States*, 136 F3d 469 (CA 6, 1998) to claim that "Congress enacted IGRA to give states a role in regulating Indian gambling." TOMAC Brief at 8. Nothing in that decision, however, addresses the scope of state regulatory or lawmaking authority over Indian gaming. Rather, the only issue presented in *Keweenaw Bay* was whether a particular provision of IGRA outlining *federal* requirements for the location of tribal casinos applied to the gaming operations being challenged there. *See id.* at 473. TOMAC's attempt to suggest that the case speaks to the issue presented here is far wide of the mark.

In summary, the fundamental premise of TOMAC's brief is incorrect. Before the State of Michigan entered into the Compacts under attack here, it had no authority to regulate permitted gaming on Indian lands or to arrest individuals for unlawful gambling in Indian country. As discussed below, the State then negotiated Compacts in which it did not seek any such authority for itself. That continued absence of state authority in Indian country did not constitute State lawmaking.

IV. The State Properly Assented to the Tribes' Exercise of Their Federal Right to Game on Indian Lands Through Resolution.

When the State availed itself of the opportunity provided to it under IGRA to negotiate gaming compacts with the Amici Tribes, it did not seek for itself any regulatory or lawmaking role with respect to these Tribes. Rather, it consented to a set of Compacts under which Indian gaming is regulated only by the Tribes and the federal government, with the State expressly disclaiming any regulatory role. The Compacts, therefore, express the State's consent, pursuant to federal law, to the operation of federal and tribal law in connection with Indian gaming. As long-established precedent indicates, this expression of consent did not constitute state lawmaking, and the legislature properly approved the Compacts by resolution.

State legislatures enact resolutions, not bills, to ratify federal constitutional amendments. *See, e.g.*, *Coleman v Miller*, 307 US 433 (1939) (Kansas legislature adopted resolution ratifying proposed federal child labor constitutional amendment); *Hawke v Smith*, 253 US 221 (1920) (Ohio legislature adopted resolution ratifying 18th Amendment); *Leser v Garnett*, 258 US 130 (1922) (Tennessee and West Virginia

legislatures adopted resolutions ratifying 19th Amendment); *United States v House*, 617 F Supp 237 (WD Mich 1985) (indicating that all states that purportedly ratified the 16th Amendment, did so by resolution; rejecting challenge to the validity of those resolutions).

Michigan adheres to this uniform practice. *See Decher v Vaughan*, 209 Mich at 566-67 ("a resolution, ratifying a proposed amendment to the Constitution of the United States providing for national prohibition..."). And, of critical importance here, this Court has expressly recognized that this practice – consenting by resolution to the adoption of a federal constitutional amendment – does not constitute state lawmaking:

> The action of the Legislature in ratifying an amendment [to the federal constitution] is not, strictly speaking, a legislative act. It is but one of several steps required to be taken to change the Federal Constitution. The congress, or the States by petition, must first propose an amendment. In order that it may become operative, it must receive the assent of the States by ratification in the manner provided in article 5. How shall such assent be expressed? *By the adoption by the State legislature of a joint resolution ratifying the amendment.* The State thus participates in the making of a new law simply by expressing its assent thereto in the manner provided. *It has not thereby enacted a law* any more than the President or governor does so by approving bills passed by the congress or legislature.

Id. at 571 (emphasis added).

Later in the same year in which this Court decided *Decher*, the United States Supreme Court adopted the same analysis regarding this point. In *Hawke v Smith*, 253 US 221 (1920), the Court made it clear that "ratification by a State of a [federal] constitutional amendment *is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the State to a proposed amendment.*" *Id.* at 229 (emphasis added). Both *Decher* and *Hawke* held that because ratification of a federal constitutional amendment is not state lawmaking, additional state law requirements

applicable to state lawmaking (in those cases, referendum requirements) could not be imposed on the ratification process. This principle has retained its vitality in the years since those cases were decided. *See, e.g., Leser v Garnett*, 258 US 130; *Kimble v Swackhamer*, 439 US 1385 (1978) (Rehnquist, J, in Chambers); *Barker v Hazeltine*, 3 F Supp2d 1088, 1093 (DSD 1998); *League of Women Voters v Gwadosky*, 966 F Supp 52, 57-58 (D Me 1997); *Donovan v Priest*, 931 SW2d 119, 125-26 (Ark 1996); *Bramberg v Jones*, 978 P2d 1240, 1247-48 (Cal 1999).

This line of cases – originating with this Court's decision in *Decher* – underscores that state consent to the adoption of a binding rule of federal law is not state lawmaking. These cases also reflect that in determining what constitutes state lawmaking, context matters. An action of the state legislature involving approval of federal law is not the same, for this purpose, as an action of the state legislature formulating binding rules of state law.

TOMAC contends that, in every instance, an action of the state legislature is state lawmaking (and thus must be enacted by a bill) if it "(1) has the power to alter the rights, duties, and relations of parties outside the legislative branch, (2) involves policy determinations, and (3) supplants other legislative methods for reaching the same result." TOMAC Brief at 1. But what happens when TOMAC's "test" is applied to the facts that this Court considered in *Decher* – which concerned the state legislature's approval of the 18th Amendment regarding prohibition? Certainly, the prohibition Amendment altered the rights of parties outside the legislative branch – as it made conduct broadly illegal that previously had been legal. Second, the legislature's action on the prohibition

Amendment surely involved policy determinations – most fundamentally, what was the State's policy on the possession and sale of alcoholic beverages? Third, the ratification of the prohibition Amendment supplanted the possibility of the state legislature taking other action to achieve the same result through state legislation. In short, TOMAC's proposed "test" inevitably leads to a result directly contrary to this Court's decision in *Decher*.[13]

Likewise, TOMAC argues that certain features of the legislature's resolution approving the gaming compacts (HCR 115) demonstrate that it was an exercise in state lawmaking. TOMAC Brief at 18-19. Here again, comparison with the 18th Amendment at issue in *Decher* is instructive. For example, TOMAC argues (incorrectly, as demonstrated above) that HCR 115 is legislation because it determined the jurisdictional balance between the State and the Tribes (even though it did not alter the pre-existing jurisdictional balance). But the 18th Amendment clearly altered jurisdiction over

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[13] TOMAC relies most heavily on *Blank v Department of Corrections*, 462 Mich 103, 611 NW2d 530 (2000). But *Blank* did not address anything even remotely like the question here – which is whether state legislative consent to the application of federal law is state lawmaking. *Blank* concerned the issue, arising exclusively in the context of state law, of whether the authority to block executive agency regulations was a legislative function. Nothing in *Blank* suggests an intent to address the issue here. *See* 462 Mich at 116 ("My conclusion is based on the facts of this case."). Nor does *Blank* indicate any intent to overrule *Decher*. Further, the basic concern expressed by the Court in *Blank* – that the governor was completely bypassed in the legislative veto process – is absent here. Likewise, Constitutional history was a significant element in *Blank* - the Constitution contains a provision authorizing legislative veto of agency regulations but only between legislative sessions, and the voters in 1984 rejected a proposed Amendment to expand that provision. *Id.* at 118-119. In contrast, the Michigan Constitution does not address the manner to approve Indian gaming compacts, nor have the voters of the State considered that question. In short, even apart from considerations regarding the extent to which a split decision of this Court may be viewed as providing a sound basis for decision in subsequent cases, the context, rationale and Constitutional history of *Blank* are all fundamentally different than those involved here.

intoxicating liquors, imposing federal jurisdiction where previously none existed. TOMAC argues (again, incorrectly) that HCR 115 is legislation because it determines how many casinos each tribe will have (even though it simply reflects the Tribes' agreement to limit the number of their casinos). But the 18th Amendment clearly determined how many liquor establishments each state would have (zero). TOMAC argues (again, incorrectly) that HCR 115 is legislation because it sets the minimum age for casino gambling (even though it in fact reflects the Tribes' decision about the minimum gaming age that the Tribes will enforce). But the 18th Amendment clearly changed the legal drinking age by making all sale of liquor unlawful. The point is that while the 18th Amendment worked significant changes in law and public policy with respect to intoxicating liquors in Michigan, it did so as a matter of federal law. As a result, notwithstanding the changes that the 18th Amendment affected, this Court, in *Decher*, held that the legislature's ratification of that Amendment was not state lawmaking.

The *Decher* principle – that a state legislature consenting to the application of federal law is not undertaking state lawmaking – is also reflected in longstanding practice regarding the allocation of jurisdiction in Indian country. In 1953, Congress enacted a measure known as "Public Law 280," which delegated to five specified states criminal and civil jurisdiction over causes of action arising in Indian country within those states. Act of August 15, 1953, ch 505, 67 Stat 588 (codified as amended at 18 USC § 1162, 25 USC §§ 1321-26, 28 USC § 1360. Public Law 280 also gave other states the option of assuming such jurisdiction if they wished to do so. *See generally Washington v*

Confederated Bands & Tribes of the Yakima Indian Nation, 439 US 463 (1979). In 1968, Congress amended Public Law 280 to authorize those states that had commenced to exercise such jurisdiction over Indian Country to retrocede it back to the United States. 25 USC § 1323.

Nebraska was one of the states that had been given jurisdiction over Indian country under Public Law 280. And Nebraska, like Michigan, *does not permit state lawmaking in the form of a legislative resolution. Bauer v Lancaster County School District*, 501 NW2d 707, 711 (Neb 1993). Tellingly, however, when the Nebraska legislature determined it no longer wished to maintain Public Law 280 jurisdiction, it enacted a resolution (not a bill) to retrocede that jurisdiction back to the United States. *See Omaha Tribe of Nebraska v Village of Walthill*, 334 F Supp at 827 & n6 (setting forth the text of the legislative resolution), *aff'd*, 460 F2d 1327 (CA 8, 1972). While that retrocession was challenged on a number of grounds, *id.*; *see also Tyndall v Gunter*, 681 F Supp 641 (D Neb 1987), *aff'd* 840 F2d 617 (CA 8, 1988); *United States v Brown*, 334 F Supp 536 (D Neb 1971); *State v Goham*, 187 NW2d 305 (Neb 1971), no one questioned the legislature's authority to act by resolution.

Nebraska's retrocession of jurisdiction under Public Law 280, like the approval of federal constitutional amendments, involved a state's choice about consenting to federal authority – accomplished by a legislative resolution, not by means of a bill. It stands as a clear example that, even where a state has a full measure of preexisting jurisdiction over Indian country, it may decide, pursuant to federal law, to cede that jurisdiction without engaging in lawmaking. In this case, as set forth in Sections II and III above, Michigan

had no preexisting jurisdiction over Indian gaming – as *Cabazon* and IGRA make clear. But even if it did by virtue of a grant from Congress as with Nebraska under P.L. 280, its exercise of a choice about whether or not to retain that jurisdiction would not involve state lawmaking.

Nothing in the Compacts under attack here grafts state law or jurisdiction onto Indian gaming in contravention of the foundational premises of *Cabazon* and IGRA – that exclusive lawmaking authority over Indian gaming resides with the Tribes.[14] To the contrary, in the Compacts the State expressly disclaims any regulatory or law enforcement role, leaving all such matters to the United States and the Tribes, pursuant to IGRA. This is underscored repeatedly in the Compacts. In their purposes section, for example, the Compacts state that one of their objectives is:

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[14] This case does not present any question regarding the authority of the legislature, by resolution, to approve a gaming compact that asserted state jurisdiction or required the creation of a state regulatory agency with respect to Indian gaming. Nevertheless, TOMAC relies on cases from other states that involve such compacts. TOMAC Brief at 31-33 (relying on *State ex rel Clark v Johnson*, 904 P2d 11 (N Mex 1995); *Kansas v Finney*, 836 P2d 1169 (Kan 1992); and *Saratoga County Chamber of Commerce v Pataki*, 798 NE2d 1047 (NY 2003)). Those cases are fundamentally unlike this case. In each of those cases, the governor acted unilaterally to enter a compact, with no involvement by the legislature. Here, the governor and the legislature both approved the compacts. Moreover, in each of those cases, the compact provided for a significant allocation of state resources to the regulation of Indian gaming – including either a direct law enforcement presence or the creation of a state regulatory agency. Here, in contrast, the State expressly disclaimed any law enforcement or regulatory role in the compacts, but instead consented to the Tribes' exercise of their rights under federal law.

Clear confirmation of the fallacy of TOMAC's position comes from the fact that the very principle that the State and the Amici Tribes advance here – that state consent to federal and tribal jurisdiction is not state lawmaking – is widely recognized in the States, including the very States from which TOMAC's ostensibly supportive cases arise. *See, e.g,, Coleman v Miller*, 71 P2d 518, 521 (Kan 1937) (concurrent resolution ratifying proposed federal constitutional amendment "was not on an act of legislation having the force of law"), *aff'd*, 307 US 433 (1939); *Koenig v Flynn*, 234 AD 139, 142 (NY S Ct App Div 1931) (relying on *Hawke v Smith*, which holds that "the adoption of the [federal constitutional] amendment did not require an act of the law-making power"), *aff'd*, 285 US 375.

> To establish procedures to notify the patrons of the Tribe's Class III gaming establishment that the establishment is not regulated by the State of Michigan and that patrons must look to the tribal government or to the federal government to resolve any issues or disputes with respect to the operations of the establishment.

Little River Band Compact Section 1(I), TOMAC App. at 51a. The Compacts further specify that any limitations on Indian gaming "shall be determined by duly enacted tribal law or regulation" and that "state law restrictions, limitations or regulation of such gaming shall not apply to Class III games conducted by the Tribe pursuant to this Compact," a recitation showing that the *status quo* of no state jurisdiction over tribal gaming on Indian lands remains intact. Little River Band Compact Section 3(A), TOMAC App. at 53a. With respect to licensing, it is the Tribe, not the State, which is in charge:

> The Tribe shall license, operate and regulate all Class III gaming activities pursuant to this Compact, tribal law, IGRA, and all other applicable federal law. This shall include but not be limited to the licensing of consultants (except legal counsel), primary management officials, and key officials of each Class III gaming activity or operation. Any violation of this Compact, tribal law, IGRA, or other applicable federal law shall be corrected immediately by the Tribe.

Little River Band Compact Section 4(C), TOMAC App. at 54a. Perhaps most strikingly, the Compacts contain the following provision:

> **SECTION 8. NOTICE TO PATRONS**
>
> In the facility of the Tribe where Class III gaming is conducted the Tribe shall post in a prominent position a notice to patrons at least two (2) feet by three (3) feet in dimension with the following language:
>
> **NOTICE**
>
> **THIS FACILITY IS REGULATED BY ONE OR MORE OF THE FOLLOWING: THE NATIONAL INDIAN GAMING COMMISSION, BUREAU OF INDIAN AFFAIRS OF THE US DEPARTMENT OF THE INTERIOR AND THE GOVERNMENT OF THE LITTLE RIVER BAND OF OTTAWA INDIANS.**

THIS FACILITY IS NOT REGULATED BY THE STATE OF MICHIGAN.

Little River Band Compact Section 8, TOMAC App. at 61a.

The language of these Compact provisions could not be clearer. The State expressly declined to take on any regulatory role and merely consented to ongoing federal and tribal enforcement and regulation of Indian gaming. Accordingly, consistent with *Decher* and the other case law discussed above, there was no state lawmaking here and the legislature properly approved the compacts by resolution.

CONCLUSION AND RELIEF REQUESTED

After generations of poverty, the Indian tribes of Michigan have a basis for significantly improving the social and economic well-being of their people: through Indian gaming. That is what Congress intended when it enacted IGRA in 1988, and that is what the State of Michigan intended when it entered into Compacts with each of the Amici Tribes. TOMAC seeks to undermine all this with a legal theory that is flawed at its base.

For the reasons set forth in this brief, as well as those set forth in the Brief of the State of Michigan, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

Geoffrey Gillis (per RAK -- telephone authority at)

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ATTACHMENT A

Little River Band of Ottawa Indians
Governmental Expenditures from Class III Gaming Revenues
2003*

Examples of Tribal Government Programs Supported by Casino Revenue

Elder Services	$ 1,029,000
Housing and Social Services	$ 1,300,000
Health Care	$ 1,705,660
Public Safety and Prosecutor's Office	$ 1,139,067
Judiciary	$ 570,078
Education	$ 765,000

* Based on actual revenue and expenditures from January 1, 2003 to November 30, 2003 and projections for December 2003.

Prepared by Steven Wheeler, Controller, Little River Band of Ottawa Indians

ATTACHMENT B

Little Traverse Bay Bands of Odawa Indians
Governmental Expenditures from Class III Gaming Revenues
2003*

Examples of Tribal Government
Programs Supported by Casino Revenue

Health & Human Services Direct Assistance and Cultural Activities	$	2,923,532
Housing Program	$	378,980
Law Enforcement and Tribal Courts	$	738,000
Natural Resources Programs	$	817,321
Education Programs	$	707,832

* Revenue and Expenditures from January 1, 2003 to September 30, 2003

Prepared by Valerie Tweedie, Chief Financial Officer, Little Traverse Bay Bands of Odawa Indians

ATTACHMENT C

STATE OF MICHIGAN

LEGISLATIVE TRIBUTE

TO

Little Traverse Bay Band of Odawa Indians

2003 Petoskey Chamber of Commerce

MISSION AWARD WINNER

IN RECOGNITION OF A BUSINESS, ORGANIZATION, OR INDIVIDUAL WHO HAS DEMONSTRATED SIGNIFICANT CONTRIBUTIONS OF TIME, ENERGY AND CREATIVITY THAT FURTHER THE IDEALS SET FORTH IN THE CHAMBER MISSION STATEMENT:

"To serve our community and membership through the promotion of tourism, resort trade, business and light industry in this area; to enhance and contribute to the economic well being of the business community through the promotion of sound government, orderly economic growth and development of an informed membership; to preserve and protect the amenities of this historic resort area."

JASON ALLEN
STATE SENATOR
THE THIRTY SEVENTH DISTRICT

SCOTT SHACKLETON
STATE REPRESENTATIVE
THE ONE HUNDREDAND SEVENTH DISTRICT

THE NINETY-SECOND LEGISLATURE
AT LANSING
DECEMBER 3, 2003

ATTACHMENT D

PETOSKEY REGIONAL
CHAMBER OF COMMERCE
Working for Northern Michigan's Future Since 1920

2003 CERTIFICATE OF RECOGNITION

Congratulations are accorded to the Little Traverse Bay Bands of Odawa Indians upon being named a recipient of the **Chamber MISSION AWARD**.

This prestigious award is presented annually to those individuals, businesses, or organizations demonstrating significant contributions of time, energy, and creativity that further the ideals set forth in the Chamber Mission Statement:

> *To promote tourism, business, and industry in this area. To enhance and contribute to the economic well being of the business community by promoting sound government, orderly economic growth, and development of an informed membership. Further, to preserve and protect the amenities of this historic resort area.*

The Little Traverse Bay Band of Odawa Indians has emerged as an integral economic force in the region. The completion of their headquarters near Harbor Springs has allowed them to expand and enhance services to tribal members and the community, especially in the areas of tribal law, cultural heritage, and higher education programs. They have also created an economic development division of the tribe that explores entrepreneurial opportunities. Their economic division played an integral role in the creation of a Biz Resource Center which opened this year at the Northwest Michigan Works Office that offers free resources to any new and existing business in the area.

Through their casino operation, the Little Traverse Bay Bands acquired the former Holiday Inn Hotel and then infused $6 million into the facility to create a first-class hotel and conference center. Their casino has underwritten and sponsored a wide range of community events including many Chamber programs such as Festival on the Bay and the Fall Kids Fest to name a few. Their Jiimaan Challenge Canoe Race was a featured event at the Festival on the Bay and helped showcase some of the tribe's cultural heritage and our local history.

In support of this recognition, the Chamber Mission Awards are graciously sponsored by Harbor/Brenn Agencies, Northern Michigan Hospital, Petoskey News-Review, First Community Bank, H & D Inc., and Clark Construction.

Presented on behalf of our Chamber membership, which commends your dedication and accomplishments.

Stephen Tresidder
Chamber President, 2003

December 2, 2003

ATTACHMENT E

INTERLOCAL AGREEMENT FOR DEPUTIZATION AND MUTUAL LAW ENFORCEMENT ASSISTANCE BETWEEN THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS AND THE COUNTY OF EMMET

PREAMBLE

1. This Agreement is entered into by the County of Emmet and the Little Traverse Bay Bands of Odawa Indians pursuant to the Urban Cooperation Act, MCL 124.501 et seq.

2. The Little Traverse Bay Bands of Odawa Indians is a federally recognized Indian Tribe pursuant to the terms of Public Law 103-324, 25 USC § 1300k (hereafter LTBB or Tribe), and the County of Emmet is a municipal corporation in the State of Michigan.

3. LTBB is authorized to enter into agreements with federal, state and local governments under Article VII (1)(b) of the Tribal Constitution as well as the Urban Cooperation Act. The County of Emmet is authorized to enter into agreements under State law as well as the Urban Cooperation Act.

4. The additional signatories (the Emmet County Sheriff, Emmet County Prosecutor, LTTB Police Chief and LTTB Prosecuting Attorney) are in agreement with the provisions of this Interlocal Agreement as it effects their respective powers and duties.

5. The Sheriff is authorized under MCLA 51.70 and 51.73 to appoint special deputies "by an instrument in writing, to do particular acts."

PURPOSE

6. LTBB and Sheriff desire to maximize effective law enforcement for all those present in Emmet County by providing for the deputization of the LTBB Tribal Police officers on LTBB's Trust lands under the powers granted the Sheriff under MCLA 51.70 and 51.73 and to empower the LTBB officers with such authority to fulfill the duties and responsibilities of a Sheriff's special deputy pursuant to the Statutes of the State of Michigan.

7. The parties do not intend by this Agreement to establish a separate legal or administrative entity under Section 7(1) of the Urban Cooperation Act (MCL 124.507(1)) and have not therefore provided for or otherwise established such an entity by the terms of this Agreement.

DEFINITIONS

8. As used in this Agreement:

ECSD means the Office of Sheriff of Emmet County, or his deputies where applicable

LTBB or Tribe means the Little Traverse Bay Bands of Odawa Indians

County means Emmet County

Trust lands means lands held by the United States in trust for the Little Traverse Bay Bands of Odawa Indians, as follows:

See Attachment "A" for the list of properties in trust

Any further additional trust parcels shall be identified in addenda to this Agreement.

AGREEMENT

9. The term of this Agreement is from the date that all signatories have signed this Agreement until December 31, 2004, except that if the Sheriff or LTTB police chief no longer hold their position, their successor may terminate this Agreement immediately in writing forwarded to the County and to the LTBB.

10. Trust land access by non-Tribal law enforcement officers and mutual assistance:

A. Non-Emergency Situations: In the investigation of a criminal offense, an ECSD law enforcement officer may only enter onto LTBB's Trust land after first contacting and receiving permission from LTBB's Police Department to do so. LTBB's Police Department may condition approval of such request on an LTBB officer accompanying the non-Tribal officer onto the Trust land.

B. Life Threatening Emergencies: In life threatening emergency situations on LTBB's Trust land, the nearest law enforcement car of any governmental unit may respond, and the LTBB Police Department shall be notified as soon as possible.

C. Hot pursuit is allowed in accordance with paragraphs 12-14 below.

D. In the event that a situation is in progress on Trust lands that requires immediate law enforcement presence to hold down the peace, and an LTBB officer is not readily available, the LTBB Police Department may request response by ECSD to hold down the peace until an LTBB law enforcement officer arrives.

E. In the event that a situation is in progress off Trust lands that requires immediate law enforcement presence to hold down the peace, and an ECSD officer is not readily available, the ECSD may request response by the LTBB Police Department to hold down the peace until an ECSD law enforcement officer arrives.

Deputization of Tribal Law Enforcement officers

11. A. LTBB police officers, upon presentation of written evidence of certification satisfactory to the State of Michigan, and meeting the requirements for deputization and approval of individual LTBB police officers as determined by the Sheriff, may be deputized by the Sheriff, upon taking the oath as described in MCL 51.73, to act as a Sheriff's special deputy within Trust lands for all civil and criminal infractions which come under the jurisdiction of the State of Michigan and/or Emmet County.

LTBB and its police officers will comply with the requirements of MCL 28.609 and abide by all ECSD policies regarding law enforcement. A copy of those policies will be provided by ECSD to LTBB police chief for distribution to tribal police officers. ECSD will promptly provide copies of any later changes or amendments to those policies. LTBB will obtain signed acknowledgments from tribal officers who have been deputized, evidencing the receipt of the original policies and/or any later changes or amendments of those policies.

This Agreement confers no rights of employment with Emmet County on LTBB police officers. The LTBB police officers are not entitled to any of the rights, privileges and benefits of employment with Emmet County except as may be stated in this agreement.

B. LTBB police officers serve as a deputy sheriff pursuant to this Agreement at the pleasure of the Sheriff. The Sheriff may revoke the deputy status of a LTBB police officer at any time, with or without cause.

C. The LTBB police chief and the Sheriff shall each appoint an officer of their respective departments to serve as a liaison between the two departments.

Hot Pursuit

12. Any State law enforcement officer, duly authorized as a peace officer, who observes the commission of a felony offense, a misdemeanor offense, and/or traffic offenses including civil infraction offenses off Trust lands, or who has reasonable cause to believe a felony or misdemeanor punishable in excess of 92 days has been committed off Trust lands, and pursues the offender without unreasonable delay, is authorized to continue that pursuit onto Trust lands until the offender is apprehended. The officer may issue citations or effect an arrest of the offender as if the officer had not entered onto Trust lands. The officer will notify LTBB Police as soon as it is reasonable after entry into Trust lands. The officer may request the assistance of LTBB Police as needed.

13. Any LTBB law enforcement officer who observes the commission of a felony offense or a misdemeanor offense on Trust lands, or who has reasonable cause to believe a felony has been committed on Trust lands, and pursues the offender without unreasonable delay is authorized to continue that pursuit off of Trust lands until the offender is apprehended. The officer may issue citations or effect an arrest of the offender as if the officer had not left Trust lands. The officer will notify ECSD as soon as it is reasonable after leaving Trust lands. The officer may request the assistance of ECSD officers as needed.

14. The hot pursuit conducted under the provisions of this Agreement shall conform with the policy and procedure of ECSD regarding high speed pursuit, whether on or off Trust lands.

In the event of hot pursuit by LTBB officers off of Trust lands, ECSD should be notified of any pursuit and LTBB officers shall abide by the ECSD pursuit policy. The distribution to LTBB police and acknowledgment by LTBB police of this policy will be in conformance with Paragraph 11(A). A command officer with the ECSD has the authority to call off a pursuit by LTBB police officers on non-Trust lands pursuant to the ECSD pursuit policy.

In the event of hot pursuit by ECSD officers on Trust lands, LTBB police should be notified of any pursuit. A command officer with the LTBB has the authority to call off a pursuit by ECSD officers on Trust lands pursuant to the ECSD pursuit policy.

Arrests

15. LTBB agrees to make arrests for ECSD on Trust lands pursuant to a valid State Court warrant and to deliver the arrestee to ECSD. ECSD agrees to make arrests for LTBB outside of Trust lands pursuant to a valid Tribal Court warrant and to deliver the arrestee to the LTBB Police Department.

16. Court Rules. The provisions of Michigan Court Rule 2.615, enforcement of Tribal judgments and orders, and the LTBB Court Rules regarding enforcement and recognition of foreign judgments and orders, shall apply to this Agreement.

Search Warrants

17. County law enforcement officers must present search warrants authorizing the search for evidence located on Trust lands to the State Court and Tribal Court for enforcement, and for execution by Tribal law enforcement authorities. The LTBB Prosecuting Attorney agrees to review and prepare search warrants for Trust lands.

18. When executing a state search warrant, enforced through the Tribal Court, the LTBB Police Department will observe all requirements of State and Federal law regarding the conduct of searches. ECSD officers shall accompany Tribal officers when a state warrant is executed.

19. Tribal law enforcement officers must present search warrants authorizing the search for evidence located outside Trust lands, unless jurisdiction exists under Treaty or other Federal law, to the State Court and Tribal Court for enforcement, and for execution by state law enforcement authorities. The Emmet County Prosecuting Attorney agrees to review and prepare search warrants for such searches.

20. The ECSD agrees to cooperate in the execution of Tribal search warrants outside Trust lands and to observe the requirements of Tribal, State and Federal law in doing so. LTBB will provide ECSD copies of any pertinent Tribal laws in this regard.

Extradition

21. Both parties waive any requirement for formal extradition processes of anyone arrested in their respective jurisdictions to be turned over to the other jurisdiction.

Immunities

22. The provisions of 25 USC § 450f, the Federal Tort Claims Act, and all immunities from liability and exemptions from laws, ordinances and regulations which apply to Tribal law enforcement officers continue to apply while officers are performing duties under this Agreement involving state jurisdiction, as well as any rights and immunities accorded Sheriff's deputies under the laws of the State of Michigan.

Hold Harmless

23. ECSD and Emmet County, its boards, commissions, officers, employees and agents, and LTBB, its boards, commissions, officers, employees and agents waive any and all claims against each other which may arise out of their activities performed under this Agreement unless such claims are

proximately caused by the gross negligence or willful misconduct of the other party or its law enforcement officers.

24. ECSD and LTBB shall be responsible for all liability of whatever nature arising from the acts of its own law enforcement officers and employees to the extent provided by law. Under no circumstances shall either the County or Tribe be held liable for the acts of employees of the other party performed under this Agreement.

Costs

25. ECSD and LTBB shall each assume responsibility for all costs incurred by their own officers acting under this Agreement.

Duration

26. Subject to Paragraph 9 above, this Agreement shall remain in full force and effect until and unless terminated by either party as provided in this Agreement, or amended by mutual written Agreement of the parties.

27. Either party may terminate this Agreement at any time upon ten (10) days written notice. The Sheriff may immediately revoke the deputy status of an individual LTBB officer without terminating the Agreement.

Non-discrimination

28. Except to the extent that Federal law allows LTBB to follow Indian preference, neither party shall discriminate against any employee or applicant for employment because of race, creed, color, sex, national origin, physical handicap, age, height, weight or marital status, except insofar as it relates to a bona fide occupational qualification reasonably necessary to the normal operation of the business. Such action shall include, but not be limited to the following: hiring; employment; upgrading; demotion or transfer; recruitment or recruitment advertisement; layoff or termination; rates of pay or other forms of compensation; and selection for training including apprenticeship. In addition, each party agrees that its services and activities related to this Agreement will be delivered without discrimination based on disability consistent with the Americans with Disabilities Act of 1990.

Applicable Law

29. In the event of a dispute regarding the interpretation of the terms of this Agreement and the enforcement thereof, the parties agree to seek mediation through Northern Community Mediation.

In the event that mediation is unsuccessful, the parties agree that any issues of this Agreement to be decided by a court will use Michigan law as it relates to contracts.

Savings Clauses

30. This Agreement, or any commission issued pursuant to it, shall not confer any authority on a state or tribal court, or other state, tribal or county authority which that court or authority would not otherwise have. Nothing in this Agreement shall be construed to cede any jurisdiction of either of the parties, to waive any immunities, to modify the legal requirements for arrest or search or seizure or to otherwise modify the legal rights of any person, to accomplish any act in violation of state, federal, or tribal law or to subject the parties to any liability to which they would not otherwise be subject to by law.

31. The provisions of this Agreement are severable and should any provision be held invalid or unenforceable, the remainder of this Agreement remains in effect unless terminated as provided in this Agreement.

The undersigned execute this Agreement as duly authorized representatives of the respective parties:

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

By:

Date: 1/21/03

Gerald V. Chingwa, Tribal Chairman

Date: 1-21-03

Jeffery Cobe, LTBB Chief of Police

Date: 1·30·03

William Gregory, LTBB Tribal Prosecuting Attorney

COUNTY OF EMMET

By:

Date: 1-16-03

James E. Tamlyn, Chair, Board of Commissioners

Date: 1-20-03

Peter Wallin, Emmet County Sheriff

Date: 1-16-03

Robert J. Engel, Emmet County Prosecuting Attorney

ATTACHMENT F

DEPUTIZATION AGREEMENT
BETWEEN
THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS
AND
THE SHERIFF OF LEELANAU COUNTY

PREAMBLE

This Agreement dated March 19, 1997, is between the Grand Traverse Band of Ottawa and Chippewa Indians, an Indian tribe organized pursuant to the federal Indian Reorganization Act, 25 U.S.C. ?? 461 et seq., (hereinafter the "Tribe") and the Sheriff of Leelanau County, a political official of the State of Michigan (hereinafter the "Sheriff").

The Tribe is authorized to enter agreements with the federal, state and local governments pursuant to Article IV, Section 1(n), of the Tribal Constitution.

The Sheriff is authorized by M.C.L.A. 51.70 and M.C.L.A. 51.73 to appoint special deputies "by an instrument in writing, to do particular acts."

INTENT

The Tribe and Sheriff each wish to ensure better law enforcement by providing for the deputization of the GTB Tribal Police officers under the powers granted the Sheriff under M.C.L. 51.70 and M.C.L. 51.73 and to empower the GTB Tribal Police officers with the authority to fulfill the duties and responsibilities of the above pursuant to the statutes of the State of Michigan.

ACCORDINGLY, THE PARTIES AGREE AS FOLLOWS:

Section 1. Definitions

As used in this Agreement:

"L.C.S.D." means Leelanau County Sheriff's Department.

"Tribe" means The Grand Traverse Band of Ottawa and Chippewa Indians.

"County" means Leelanau County.

"M.L.E.O.T.C." means Michigan Law Enforcement Officers Training Council.

"Qualified Officer" means M.L.E.O.T.C. Certified.

"Primary Area" means land within the area bound by Grand Traverse Bay on the east, Putnam Road on the north to Pobuda Road to N. Jacobson Road (Hwy. 633) on the west, and McKeese/Stallman Road on the south (see attached map).

Section 2. Leelanau County Sheriff

A. The GTB Tribal Police officers are hereby deputized by the Leelanau County Sheriff to make non-Indian criminal arrests in the primary area. The GTB Tribal Police officers are deputized to issue civil infractions on the state and county roadways described in the primary area subject to the following: 1) non-Indians shall be cited into state court, 2) Indians shall be cited into GTB Tribal Court, and 3) all civil infraction tickets issued by the GTB Tribal Police officers on Peshawbestown Road, Roubal Road, Ninatigo Drive, Kitigan Mikun, Ki-Dah-Keh Mikun and Beems-Kwa-Ma Mikun roads within the interior of the primary area shall be heard in GTB Tribal Court.

1. All civil infraction tickets issued by GTB Tribal Police officers on M-22 on the east, Putnam Road on the north to Pobuda Road to N. Jacobson Road (Hwy. 633) on the west, and McKeese/Stallman Road on the south to non-Indians shall be heard in state court.

Section 3. Fresh Pursuit

A. Any duly authorized Tribal law enforcement officer who:

1. Observes the commission of a misdemeanor, including traffic infractions and crimes and pursues the offender without unreasonable delay; or

2. Observes the commission of a felony or has reasonable grounds to suspect a felony has been committed, and pursues the offender without unreasonable delay.

shall be authorized to continue that pursuit across the boundaries of the primary area until the offender is apprehended, at which time the pursuing officer shall proceed as though the boundary had never been crossed and may issue such citations or effect such arrests as are dictated by the situation.

B. As soon as it reasonably appears that the fresh pursuit of a suspect will require leaving the primary area, the Tribal officer shall make every attempt to promptly notify L.C.S.D. law enforcement authorities of the pursuit and to request their cooperation and assistance.

1. The fresh pursuit conducted under this Section shall conform with the policy and procedure of the Sheriff's Department regarding high speed pursuit.

Section 4. Qualifications and Training

A. All personnel furnished by the parties pursuant to this Agreement shall be full-time commissioned law enforcement officers, certified by M.L.E.O.T.C. The Tribe shall furnish a list of all qualified GTB Tribal Police officers on January 2nd of each year.

Section 5. Operational Plan

A. Any suspects arrested pursuant to this Agreement will be booked and lodged in the Leelanau County Jail, providing space is available.

Section 6. Costs

A. The Tribe will contract with L.C.S.D. for the lodging of prisoners within the jurisdiction of the Tribe.

B. The Tribe shall bear the expense of testifying in State Court when acting pursuant to state law.

Section 7. Arrests

A. The L.C.S.D. agrees that they will make arrests for the Tribe outside Indian country, pursuant to a valid Tribal Court warrant, and the Tribe agrees that they will make arrests in Indian country for the L.C.S.D. pursuant to a valid State Court warrant.

Section 8. Search Warrants

A. Court Rules:

1. The provisions of Michigan Court Rule 2.615, Enforcement of Tribal Judgments, and Chapter 10 of the GTB Court Rules, Rules Regarding Enforcement and Recognition of Foreign Judgments, shall apply to this Agreement.

B. State Warrants:

1. County law enforcement officers shall present search warrants authorizing the search for evidence located on the Tribe's reservation and Indian country (in accordance with the Tribal Code) to Tribal law enforcement authorities for execution.

2. The Grand Traverse Band Police Department agrees to cooperate in the execution of properly issued state search warrants within the reservation and Indian country and to observe the requirements of State and Federal law in doing so.

3. L.C.S.D. law enforcement officers may, at the invitation of Tribal authorities, accompany Tribal officers when a state warrant is executed.

C. Tribal Warrants:

1. Tribal law enforcement officers shall present search warrants authorizing the search for evidence located off the Tribe's reservation and Indian country to County law enforcement authorities for execution. The Leelanau County Prosecuting Attorney agrees to review and prepare search warrants for off-reservation searches.

2. The L.C.S.D. agrees to cooperate in the execution of Tribal search warrants off the reservation and Indian country and to observe the requirements of State, Tribal and Federal law in doing so.

Section 9. Immunities

A. All the immunities from liability and exemptions from laws, ordinances and regulations which Tribal law enforcement officers deputized by the Sheriff, pursuant to the authority of this written instrument and M.C.L.A. 51.70, have in their own Tribal jurisdiction shall be effective in the state's jurisdiction in which the Tribal law enforcement officers are giving assistance unless otherwise prohibited by law. The provisions of 25 U.S.C. 450f and the application of the Federal Tort Claims Act applies to acts performed by GTB Tribal Police officers.

Section 10. Hold Harmless

A. The Sheriff and Tribe shall waive any and all claims against each other which may arise out of their activities outside their respective jurisdictions under this Agreement unless such claims are proximately caused by the gross negligence or willful misconduct of the other party or its law enforcement officers.

B. The Sheriff and Tribe shall be responsible for all liability of whatever nature arising from the acts of its own law enforcement officers and employees to the extent provided by law. Under no circumstances shall either the County or Tribe be held liable for the acts of employees of the other party performed under color of this Agreement.

Section 11. Indemnification

A. The Tribe shall indemnify the Sheriff for all claims, judgments, or liabilities by third parties for property damage, personal injury or civil liability which may arise out of the activities of the Tribal law enforcement officers pursuant to this Agreement.

Section 12. Insurance

A. The Tribe agrees to maintain and name the Sheriff as insured on an insurance policy in the amount of $10 million per incident insuring against claims for liability and shall maintain the policy in full force and effect during the Agreement. The Tribe shall provide a copy of the policy to the Sheriff by January 2nd of each year.

B. The Tribe shall submit to the Sheriff proof of adequate insurance covering each of its Tribal law enforcement officers pursuant to this Agreement by January 2nd of each year.

C. The Tribe shall submit to the Sheriff proof of adequate insurance covering the Tribe and each of its law enforcement officers commissioned pursuant to this Agreement by January 2nd of each year.

D. The provisions of 25 U.S.C. 450 (a)-(g) "self-governance contracting" and the application of the Federal Tort Claims Act shall apply to the extent provided by

law to the actions of the Tribal law enforcement officers under this Agreement. *See:* Pub. L. No. 101-512, Title III, ? 314, 104 Stat. 1959 (*codified at* 25 U.S.C. ? 450f notes). In Comes Flying v. U.S. through Bureau of Indian Affairs, 830 F.Supp. 529, 530 (1993).

Section 13. Costs

A. The Sheriff and Tribe shall each assume responsibility for all costs incurred by their own officers under this Agreement, except as otherwise provided.

Section 14. Oversight Committee

A. A committee consisting of Tribal and Sheriff law enforcement officers shall review activities and method of performance undertaken pursuant to this Agreement.

B. The Tribe's Chief of Police and the County Sheriff shall serve as co-chairmen and shall jointly set dates and places for meetings and shall jointly preside over meetings.

C. This committee may recommend to the signatories of this Agreement any amendments for consideration by the parties. This committee shall further review, in the first instance, any dispute raised by either party or by third parties, relating to this Agreement.

D. The committee co-chairman shall invite representatives of their respective courts and prosecutors to attend the meetings. The committee shall meet at least quarterly or more frequently at the call of either the Tribe's Chief of Police or the County Sheriff to discuss the status of this Agreement and invite other law enforcement or other officials to attend as necessary.

Section 15. Duration of Agreement

A. This Agreement shall remain in full force and effect until and unless terminated by either party as provided in this Agreement.

Section 16. Suspension of Agreement

A. If any provision of this Agreement is violated by the Sheriff or any of his agents, the Tribal Council may suspend the Agreement on ten (10) days written notice to the Sheriff. The suspension shall last until the Tribal Council is satisfied that the violation has been corrected and will not recur.

B. If any provisions of this Agreement is violated by the Tribe or any of its agents, the Sheriff may suspend the Agreement immediately and terminate the deputy status of the GTB Tribal Police officers at will or upon revocation of this Agreement. The suspension shall last until the Sheriff is satisfied that the violation has been corrected and will not recur.

C. The Sheriff may exercise his power of suspension to suspend an individual GTB Tribal Police officer without suspending this Agreement.

Section 17. Revocation of Agreement

A. The Tribe may revoke this Agreement at any time by formal action upon ten (10) days written notice. The Sheriff may revoke this Agreement at any time.

Section 18. Amendments

A. This Agreement shall not be amended except by an instrument in writing executed by signatories below and attached to this Agreement.

Section 19. Saving

A. This Agreement, or any commission issued pursuant to it, shall not confer any authority on a state court or other state or county authority which that court or authority would not otherwise have.

B. Nothing in this Agreement shall be construed to cede any jurisdiction of either of the parties, to waive any immunities, to modify the legal requirements for arrest or search or seizure or to otherwise modify the legal rights of any person, to accomplish any act in violation of state, federal, or tribal law or to subject the parties to any liability to which they would not otherwise be subject to by law.

Section 20. Severability

A. The provisions of this Agreement are severable and should any provision be held invalid or unenforceable, the remainder of this Agreement remains in effect unless terminated as provided in this Agreement.

Section 21. Notice

A. Any notice required or permitted to be given under this Agreement shall be deemed sufficient if given in writing and sent by registered or certified mail.

B. In the case of the Sheriff, notices shall be sent to:

Leelanau County Sheriff
201 Chandler
Leland, Michigan 49654

C. In the case of the Tribe, notices shall be sent to:

Chief of Police
Grand Traverse Band of Ottawa and Chippewa Indians
2605 N. West Bayshore Drive
Suttons Bay, Michigan 49682

Section 22. Repealers

A. This Agreement constitutes the entire Agreement between the parties.

The effective date of this Agreement shall be the 19th day of March, 1997.

IN WITNESS THEREOF, the parties have executed this Agreement the date and year first above written by authority of the Grand Traverse Band of Ottawa and Chippewa Indians and the Leelanau County Sheriff.

COUNTY OF LEELANAU

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS

LEELANAU COUNTY SHERIFF'S DEPUTIZATION AGREEMENT

BY:_____
Mike Oltersdorf, Leelanau County Sheriff

DATE:_____

BY:
George E. Bennett, Tribal Chairman

DATE:

BY:_____
Clarence Gomery, Prosecuting Attorney

DATE:_____

BY:
Dennis Habedank, GTB Chief of Police

DATE:

BY:
William Gregory, Prosecuting Attorney

DATE: